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ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF IOWA.[2]

SUPREME COURT OF MARYLAND.[3]

SUPREME COURT OF MISSOURI.[4]

SUPREME COURT OF OHIO.[5]

SUPREME COURT OF WISCONSIN.[6]

ACTION.

Plaintiff's Negligence or Unskilfulness—When a defence pro tanto only—Evidence.—A person employed to keep the account books of another may recover the balance due for his services upon other proof thereof, although the books were so negligently and unskilfully kept as not to show the state of the accounts between the parties: *McCormick* v. *Ketchum*, 48 or 49 Wis.

The fact that plaintiff was negligent and unskilful in his employment will not prevent his recovering what his services were really worth: *Id.*

After evidence introduced by defendant to show plaintiff's negligence and want of skill in his employment, it was competent for plaintiff, in rebuttal, to introduce testimony that he was competent or qualified for the employment, or that he was skilful, faithful and serviceable therein: *Id.*

AGENT. See *Insurance.*

ALIENS.

Construction of Treaty—Right to Inherit—Conflict between Treaty and State Law—Statute of Limitations.—A citizen of Switzerland died owning land in Virginia. His heirs were also citizens of Switzerland, and being aliens could not, under the laws of Virginia, inherit the property. By a treaty between the United States and Switzerland it was provided that in such a case there should be accorded to the heirs such terms as the laws of the state would permit, to sell such property. No such terms had been fixed by the laws of the state. Upon a suit by the heirs: *Held*, that the treaty gave them the right to sell, and no limit being fixed by the state, this right might be exercised at any time: *Hauenstein* v. *Lynham*, S. C. U. S., Oct. Term 1879.

A treaty made by the United States is as much a part of the law of every state as its own local laws and constitution, and in case of a conflict the treaty must prevail: *Id.*

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1 Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1879. The cases will probably be reported in 10 or 11 Otto.

2 From J. S. Runnels, Esq., Reporter; to appear in 51 Iowa Reports.

3 From J. Shaaff Stockett, Esq., Reporter; to appear in 50 Md. Reports.

4 From T. K. Skinker, Esq., Reporter; to appear in 69 Mo. Reports.

5 From E. L. De Witt, Esq., Reporter; to appear in 35 Ohio St. Reports.

6 From Hon. O. M. Conover, Reporter; to appear in 48 or 49 Wis. Reports.

AMENDMENT. See *Former Adjudication.*

ASSUMPSIT.

Duty imposed by Statute.—Wherever a duty is imposed by Act of Assembly, and no other mode of enforcing it is prescribed, the action of assumpsit will lie, on the principle that where the law gives a claim to one against another, it raises an implied assumpsit on the legal obligation to pay: *Appeal Tax Court of Baltimore* v. *Patterson*, 50 Md.

BAILMENT.

Storage of Grain—Warehouseman—Liability of.—Where grain was delivered to a warehouseman and stored by him in a separate bin, and a receipt returned to the owner which stated that the grain was "bought at owner's risk as to fire," no price being stipulated in the receipt, and it appeared to be the local custom that grain was received in this manner by warehousemen, and afterward purchased or returned, and it further appeared that the warehouseman in this instance offered to purchase the wheat while it was in store, but the owner refused to sell: *Held*, that the warehouseman was not liable for the subsequent destruction of the grain by fire: *Irons* v. *Kentner*, 51 Iowa.

BILLS AND NOTES.

Alteration—Innocent Holder.—A negotiable note for $10 was executed and delivered with a blank preceding the amount, and another blank to be filled with the name of place of payment. Afterward the words and figures were so changed as to make the amount one hundred and ten dollars, and a place of payment was inserted. There was nothing in the appearance of the note to excite suspicion, and it was taken by plaintiff after alteration, before maturity, for a valuable consideration and without notice of the alteration: *Held*, that no recovery could be had thereon: *Knoxville Bank* v. *Clark*, 51 Iowa.

Endorsement for Collection.—A promissory note endorsed for collection cannot be transferred by one receiving such endorsement to another who has notice of the limitation upon the authority of the holder: *Claflin* v. *Wilson et al.*, 51 Iowa.

A note having been endorsed for collection, and the endorsee having sold the note, the retention of the money by the payee, in ignorance of the fact that the note was sold, would not constitute a ratification of the sale: *Id.*

Oral Evidence of Waiver of Demand and Notice by Endorser.—Oral testimony is admissible to prove that the endorser, as between himself and the endorsee, at the time of endorsing a note in blank, waived demand and notice: *Dye* v. *Scott*, 35 Ohio St.

A waiver of demand of payment at the maturity of a note is also a waiver of notice of non-payment: *Id.*

BOND. See *Surety.*

CONFLICT OF LAWS. See *Taxation.*

CONSTITUTIONAL LAW. See *Criminal Law; Navigable Waters; Taxation.*

CONTRACT. See *Damages; Equity.*

Mutual Propositions not accepted — Meeting of Minds — Letters — Partnership—Admission of New Partners—Effect of on Contract.—A commission firm at C. employed an agent at Q. to obtain consignments and make advances, and arranged with a bank at Q. to cash his drafts. Afterwards they wrote to the bank that they would pay drafts only on actual consignments, to which the cashier replied that thereafter they would require a shipping bill. Afterwards and after two new partners, without the knowledge of the bank, had been added to the firm, the bank, without requiring shipping bills, cashed drafts, which the firm paid. No consignments had been made to meet these drafts. In a suit by the firm against the bank: *Held*, that there was no binding contract on the part of the bank to require shipping bills: *Held, further*, that if there had been such contract it would have been determined by the addition of the new partners without the knowledge or consent of the bank: *First Nat. Bank* v. *Hall*, S. C. U. S., Oct. Term 1879.

CONTRACTOR.

Payment in Instalments—Default of Payor—Rights of Contractor.—Where work is done under a contract which provides for payment by instalments at stated periods, and the payments are not made, the contractor may quit the work and he will then be entitled to recover for all that he has done at the contract rates; and this notwithstanding the contract provides in express terms that the work shall be steadily prosecuted without intermission to final completion: *Bean* v. *Miller*, 69 Mo.

Where it is stipulated in a contract that the work to be done under it is to be paid for upon the estimates of an engineer, to be made at stated times, if the engineer makes only approximate estimates, and the contractor is prevented from completing the work through the fault of the other party, he may recover for the whole amount of work done, as well that of which no estimate has been made as that which has been estimated: *Id.*

CORPORATION.

Estoppel—Ultra Vires.—It being alleged by a corporation that the board of directors, by which a resolution was adopted authorizing a loan and the execution of a deed to secure the same, was not a legally constituted board: *Held*, that the deed and the bonds having been executed with all the legal formalities required by the charter of the company and its amendments, and the bonds negotiated in open market, and their proceeds paid to the company, and appropriations made by it to pay the interest, the company cannot be allowed to disavow and repudiate its own acts to the injury of *bona fide* bondholders without notice: *Harrison* v. *Annapolis and Elk Ridge Railroad Co.*, 50 Md.

Whatever claims a corporation might have for interference by injunction to protect its rights against an abuse or exercise of corporate powers *ultra vires*, the corporation as such, when a party to a cause, is bound by the same rules of equity as an individual. The doctrine of estoppel applies to the one as well as to the other: *Id.*

COURTS.

Identity of Persons—Presumption in Favor of Court of General Jurisdiction.—The records of the Circuit Court showed that on the 8th

day of October 1875, Roach Millsaps was arrested on a charge of stealing certain property described in the warrant; that on the 20th day of October 1875, Pharris Millsaps, Jr., as principal, with others as sureties, entered into a recognisance for the appearance of said Pharris Millsaps, Jr., at the next January term of the Circuit Court to answer to the charge of larceny; that at the January term Roach Millsaps was indicted for the larceny of the property described in the warrant, and that at a subsequent day of the same term a forfeiture was ordered of the recognisance of Pharris Millsaps, Jr. On appeal from a judgment on a demurrer to a *scire facias* issued on the recognisance: *Held, first*, that this court would presume in favor of the acts of the Circuit Court that Roach Millsaps and Pharris Millsaps, Jr., were one and the same person; *second*, but at any rate, since this was a matter of fact and not of law, a demurrer would not lie: *State* v. *Millsaps*, 69 Mo.

Criminal Law.

Forgery.—Where, in an indictment for uttering a forged receipt, the instrument set out not *prima facie* a receipt, such extrinsic facts must be averred as are necessary to show that the instrument would, if genuine, have the operation and effect of a receipt: *Henry* v. *The State*, 35 Ohio St.

An averment that the instrument set out was a receipt, does not have the effect to change its *prima facie* character. Nor will the character of the instrument be changed by an averment that by the rules of the bank where the instrument was used, it was upon its face a receipt. It should be shown in what way the instrument, if genuine, would, under the rules of the bank, have the operation and effect of a receipt: *Id.*

Indictment—When Exceptions in a Statute must be Negatived.—Where the enacting clause of a statute is complete and the provisos making exceptions follow as distinct clauses of the statute, it is not necessary to negative the exceptions in the indictment, but the facts raising the exception relied on must come from the defence. Where there is an exception so incorporated with the enacting clause of the statute that the one cannot be read without the other, there the exception must be negatived in the indictment: *Barber* v. *The State*, 50 Md.

Instructions—Harmless Error.—Defendant being indicted for stealing a mare, the court correctly instructed the jury, both on the theory that she was stolen in the county of the trial, and on the theory that she was stolen in another county and then imported into the county of trial There was evidence that the theft was committed in the latter county. *Held*, that even if there was no evidence of larcenous taking in the other county, no error had been committed prejudicial to defendant: *The State* v. *Ware*, 69 Mo.

Intoxication as Evidence of inability to commit the Offence charged—Accessory—Conviction for second offence of the same kind—Constitutional Law.—In a criminal action it is competent for the accused to show that at or about the time when the crime was committed he was in such a physical condition as to render it improbable that he committed it; and the fact that such condition was caused by intoxication makes no difference in the rule, the intoxication not being set up as a defence: *Ingalls* v. *The State*, 48 or 49 Wis.

In a criminal action it is in general within the discretion of the court below whether to instruct the jury not to find defendant guilty upon the unsupported testimony of an accomplice; and where that court refuses a new trial after a verdict founded upon such testimony alone, the judgment will not be reversed upon that ground: *Id.*

Statutes imposing a greater penalty for a second or third offence of the same character than that imposed for the first offence, do not violate the constitutional provision which forbids putting one twice in jeopardy for the same offence: *Id.*

DAMAGES. See *Highway.*

Profits lost by other party's Breach of Contract—Evidence.—On a contract by which plaintiff undertook to get out and deliver to defendants a certain quantity of logs, while defendants were to furnish him all necessary supplies for men and teams, where it appears that, in consequence of defendants' failure to perform on their part, plaintiff was able to deliver only a part of the logs, plaintiff is entitled to recover not only the profits which he would have realized from the delivery of the logs which he was prevented from delivering, and the contract price of those actually delivered, but also the extra expense in delivering the latter caused by defendants' fault: *Salvo* v. *Duncan et al.*, 48 or 49 Wis.

Plaintiff, as a witness in his own behalf, was permitted to state the actual cost of putting in the logs delivered, and what it would have cost him had he been well supplied by defendant: *Held*, no error: *Id.*

Another witness for plaintiff, who had been employed by him in getting out the logs, and had been engaged in lumbering, "doing almost all kinds of work" connected therewith, for many years, was permitted to state his opinion as to whether plaintiff, with the force he had, could have continued, if well supplied, to put in a certain amount of logs per day: *Held*, that the evidence was of the nature of expert testimony, and admissible: *Id.*

DEED. See *Equity.*

Destruction by Parties before Recording.—Where a deed conveying real estate is executed and delivered, the destruction of the unrecorded instrument will not revest the title in the grantor; and the grantee will not be estopped to claim the land under such conveyance, unless such claim would operate as a fraud on his part: *Jeffers* v. *Philo*, 35 Ohio St.

EQUITY. See *Execution*; *Nuisance.*

Jurisdiction—Conveyance—"More or less" in a Deed.—Where the plaintiff commenced an action for a balance upon a promissory note given for the purchase of land, and the defendant averred false representations in the sale of land, and prayed for the cancellation of the note to the extent of the damages, and other relief: *Held*, that the case was cognisable in equity: *Hosleton* v. *Dickinson et al.*, 51 Iowa.

The presence in a deed of the words "more or less," after the statement of the number of acres therein, does not imply that the purchaser takes the risk of the quantity; but a slight variation from the amount stated, with this qualification, will not afford the purchaser ground for relief: *Id.*

Mistake—Reforming written Contract.—If parties enter into an agreement, and through an error in the reduction of it to writing, the written agreement fails to express their real intentions, or contains terms or stipulations contrary to their common intention, a court of equity will correct and reform the instrument so as to make it conform to the intention of the parties: *Dulany et al., Ex'rs.*, v. *Rogers*, 50 Md.

It is incumbent, however, upon the party seeking to reform a written instrument to show by conclusive proof that it does not embody the final intention of the parties. A court of equity will not rectify it unless it was executed under a common mistake, both parties having done that which neither of them intended. A mistake on one side may be ground for rescinding, but not for reforming a written agreement: *Id.*

When a Court of Equity will rescind an executed Contract of Sale.—Where a party has been induced to enter into a contract of sale by the fraudulent misrepresentations of the other party or his agent, of material facts upon which he relied and had a right to rely, a court of equity will grant him relief by refusing to decree a specific performance, or by annulling the contract after it has been carried into execution by the delivery of deeds to the purchaser; but in such case the *onus* is on the complainant to establish the allegations of his bill, by clear and conclusive proof: *McShane* v. *Hazlehurst*, 50 Md.

A party cannot be relieved from his contract merely because he may have made a bad bargain. A contract having been deliberately made and carried into execution, cannot be rescinded or set aside, at the instance of the party who alleges that he has been deceived and injured, except upon the clearest and most satisfactory proof: *Id.*

ESTOPPEL. See *Corporation; Deed; Taxation.*

Matter in Pais—When available at Law—Ejectment.—A. and B. were tenants in common. A. sold the whole tract to C., who thereupon wrote to B. B. replied by a letter to A., stating that he had intended to give his share to A., and that C. need not fear anything from him. C. then conveyed the tract by warranty deeds. In ejectment, brought nineteen years afterwards, against the purchasers by B.'s grantees, *Held*, that the letter was an estoppel *in pais* to the assertion of B.'s title: *Held further*, that this defence was available at law: *Dickerson* v. *Colgrove*, S. C. U. S., Oct Term 1879.

EVIDENCE. See *Damages.*

EXECUTION.

Public School Property exempt from Execution—Injunction.—It would be against the policy of our laws to permit the property of a board of education, held for public school purposes, to be taken in execution at the suit of a creditor: *State, to use of Board of Education*, v. *Tiedemann*, 69 Mo.

Equity will interpose by injunction to prevent a sale of such property under execution: *Id.*

FORMER ADJUDICATION.

Amendment of Claim so as to make new Cause of Action.—In this action, originally brought to recover, for an exaction of excessive charges

for the carriage of goods, the statutory penalty of three times the excess, it was determined that such an action would not lie, by reason of a repeal of the statute: 43 Wis. 688. The prayer of the complaint was then changed so as to demand only the illegal excess: *Held, first*, that this was in effect an amendment of the complaint itself, and that the question whether the action will lie under such amended complaint is not *res adjudicata*. *Second*, That, as the excessive charges are alleged to have been made "wrongfully and fraudulently," the action may be regarded as still one in tort, and the amendment was allowable. *Third*, That the cause of action at common law, now stated in the complaint, was not repealed or suspended by the statute: *Smith* v. *C. & N. W. Railway Co.*, 48 or 49 Wis.

FRAUD. See *Equity; Intoxication.*

HIGHWAY. See *Negligence.*

Defect—Notice to City—Damages for Injury caused by Defect.—It is for the jury to determine, under all the circumstances of the case, how long a defect in a sidewalk must have existed in order to charge the city with constructive notice; and there was no error in refusing to instruct them that if the defect here shown had existed but one day prior to the accident, the city was not liable unless it had actual notice: *Sheel* v. *City of Appleton*, 48 or 49 Wis.

Bodily and mental suffering caused by an injury from a defective highway may be considered in awarding damages: *Goodno* v. *Oshkosh*, 28 Wis. 300, and other cases in this court: *Id.*

HUSBAND AND WIFE.

Wife's Separate Property—Charging it for prior Debts.—Real estate inherited by a married woman since the passage of the Act of 1861 (S. & S. 391), which declares such inheritance to be her separate property, can not be charged in equity for the payment of a liability incurred by her prior to the passage of the statute: *Fallis* v. *Keys*, 35 Ohio St.

IDENTITY. See *Courts.*

INSURANCE.

Covenant against other Insurance.—A condition in a fire policy against subsequent insurance is not broken by the taking of subsequent policies by the insured which never took effect by reason of conditions therein contained: *Fireman's Ins. Co.* v. *Holt*, 35 Ohio St.

The receipt of payment on such subsequent void policies is not matter of defence in an action on the prior policy: *Id.*

Furnishing proofs of Loss as a Condition Precedent—Waiver of condition by general denial of Liability—Knowledge of Agent issuing Policy.—Where a fire insurance policy provides that the loss shall not be payable until the expiration of a specified time after the proofs of loss have been furnished, the furnishing of such proofs is a condition precedent to the right of action; and, in an action on the policy, an averment in the answer that such proofs were not furnished for the specified length of time before the action was brought, does not create an issue in abatement which must be tried before the other issue, in bar:

Harriman et al. v. *Queen Ins. Co. of London and Liverpool*, 48 or 49 Wis.

In such an action an answer showing that plaintiff furnished what purported to be proofs of loss, and that these were not accepted as a compliance with the terms of the policy, but that "defendant at once denied that any liability to plaintiffs had arisen under said alleged policy, and refused to pay any alleged claim thereunder": *Held*, to show a denial of liability in any event, and an unqualified refusal to pay the loss; which was a waiver of such proofs: *Id.*

Where the agent who issues an insurance policy knows, at the time, of outstanding encumbrances upon the property, omitted from the statements of the application, such omission will not prevent a recovery: *Id.*

INTOXICATION. See *Criminal Law.*

Contract—Fraud.—To defeat a contract on the ground of drunkenness the intoxication must have been so excessive as to deprive the party of the use of his reason and understanding: *Willcox* v. *Jackson*, 51 Iowa.

Where a party procures the intoxication of another for the purpose of securing an unconscionable advantage in a contract, the contract will be held void in an action to enforce it: *Id.*

LUNATIC.

Judgment for Debt contracted when of Sound Mind—What a sufficient service of Summons against him—Appearance of Lunatic by Attorney—A lunatic can be sued at law for a debt which he contracted when of sound mind, and judgment therefor obtained against him. Lunacy is no sufficient ground, in equity, for declaring such a judgment a nullity: *Stigers et al.* v. *Brent et al.*, 50 Md.

A summons in an action for debt was issued against a lunatic, and it appeared that the sheriff's deputy to whom the writ was delivered for service, called at the house of the defendant named therein and was informed he was lunatic and could not be seen. The sheriff's deputy thereupon explained the business in hand to the wife of the lunatic then in charge of his person, and exhibited to her the summons. She referred him to her son, by whom the lunatic's estate was managed, whom the deputy saw and to whom he showed the writ, and afterwards returned it to the sheriff with an oral statement of what he had done. The sheriff returned the writ endorsed by him, "summoned." At the following trial term two attorneys appeared for the defendant. In a proceeding in equity to set aside the judgment as null and void, it was *held*, that under the circumstances, a sufficient service of the summons was shown. A lunatic defendant of full age properly defends by attorney, the law presuming him of sufficient capacity for that purpose. The appearance of the defendant in obedience to its command gave the court jurisdiction over the case; *Id.*

MANDAMUS. See *Receiver.*

MORTGAGE.

Of Vessels—Failure to acknowledge or record—Validity of—Act of Congress.—Between the parties and as against persons having actual

notice a mortgage of a vessel is good without the acknowledgment and recording required by sections 4192 and 4193 Rev. Stat.: *Moore* v. *Simonds*, S. C. U. S., Oct. Term 1879.

Covenant of Warranty.—Where the mortgage, upon a foreclosure of the mortgage and sale of the mortgaged premises, purchases the property for the amount of the debt, interest and costs, he cannot afterward maintain an action upon the covenants of warranty contained in the mortgage, unless the sale and satisfaction of the judgment shall be set aside: *Todd et al.* v. *Johnson et al.*, 51 Iowa.

Municipal Corporation.

Liability for Consequential Damages to Private Property—Taking of Private Property for Public Use—A Municipal Corporation not responsible for an unauthorized act of the Mayor—Use of Water by Citizens under an Ordinance authorized by Act of Assembly.—The authorities of the City of Cumberland, in the execution of the powers conferred on the corporation by Act of Assembly, for the paving, grading, repairing, draining, sewering and extending of the streets of the city, but with no want of reasonable care and skill in making the improvements, changed or so directed the natural flow of surface-water, which usually found its way into a mill-race in the city, that a larger flow of such water than formerly was emptied into a mill-race, along a given street, and in times of heavy rains a larger quantity of mud, sand and debris was thus carried into the race near the mill than before such improvements were made. For the injuries caused by these obstructions to the free flow of water, the owner of the mill and its appurtenances brought suit against the city to recover damages; *Held*, that as the defendant acted within the scope of the authority conferred on it by the laws of the state, and with no want of reasonable care and skill in the execution of the power, the action could not be maintained: *Mayor of Cumberland* v. *Willison*, 50 Md.

The negligent and careless performance of a lawful act, whereby injury results, gives rise to an action against a municipal corporation as well as against an individual: *Id.*

Where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking of private property within the meaning of the constitutional prohibition: *Id.*

Where the mill-race of the plaintiff was filled by the washings from the street, by means of hose attached to fire plugs, done under the direction of the mayor of a municipal corporation, in an action for damages it was *held*, that as the act on the part of the mayor was unauthorized, the city was not responsible: *Id.*

Negligence—Liability for Damage by Wind.—A city is not liable in damages for injuries inflicted upon a person by the fall of a market house caused by a wind storm of unprecedented force and violence: *Flori* v. *City of St. Louis*, 69 Mo.

Navigable Waters.

Bridges over—Erected by State authority.—In the absence of any restrictive legislation on the subject by Congress, the state may authorize bridges over navigable streams, by statutes so guarded as to pro-

tect the substantial rights of navigation: *County Comm'rs of Talbot Co.* v. *County Comm'rs of Queen Anne Co.*, 50 Md.

NEGLIGENCE. See *Action; Highway; Municipal Corporation.*

Right to remove Snow from its track by Railway Company—True test of Exemption from Liability for Injury to another's Property.—On the 6th January 1877 there was a heavy fall of snow, and the Baltimore City Passenger Railway Company, in clearing its track running along the bed of Gay street and across Hoffman street, threw the snow into a mass at the intersection of those streets. Near by on Hoffman street was the house of the plaintiff. On the night of the day mentioned it rained very hard, and the plaintiff's house was flooded with water. He thereupon brought suit against the railway company, alleging that in removing the snow from its track and throwing it into the street it had obstructed the natural flow of water, whereby the plaintiff's house was injured. This was denied by the defendant. The verdict and judgment being for the defendant, the plaintiff appealed: *Held*, *first*, that the defendant had a right to remove the snow from its track, and in clearing its track and in throwing the snow on the bed of the street adjoining thereto, the defendant did not use the bed of the street in an unusual or unreasonable manner. *Second*, that it had no right to throw the snow in the gutter and thereby obstruct the natural flow of water from the street, because in so doing it would have been guilty of negligence; nor had it a right to bank up the snow on Gay street so as necessarily to obstruct the natural flow of water. On the contrary, it was obliged to exercise ordinary care and prudence, not only in removing the snow from its track, but also in throwing it on the street: *Short* v. *Baltimore City Passenger Railway Co.*, 50 Md.

The true test of exemption from liability in actions for injury to another's property resulting from the exercise of rights incident to the dominion and ownership of property is, whether in the act complained of, the owner has used his property in a reasonable, usual and proper manner, taking care to avoid unnecessary injury to others: *Id.*

NUISANCE.

When a Court of Equity will interfere—Nuisance from Smoke, Noxious Vapor, Noise or Vibration.—The criterion for determining whether a court of equity will interfere and restrain by injunction an existing or threatened nuisance to a party's dwelling is, whether the nuisance complained of will or does produce such a condition of things as in the judgment of reasonable men is naturally productive of actual physical discomfort to persons of ordinary sensibilities, and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant: *Dittman* v. *Repp*, 50 Md.

In determining the question of nuisance from smoke or noxious vapor, or from noise or vibration, reference must always be had to the locality, the nature of the trade, the character of the machinery, and the manner of using the property producing the annoyance and injury complained of: *Id.*

Noise alone, if it be of such a character as to be productive of actual physical discomfort and annoyance to a person of ordinary sensibility,

may create a nuisance, and be the subject of an action at law, or an injunction from a court of equity, though such noise may result from the carrying on of a trade or business in a town or city: *Id.*

If, superadded to the mere noise made by the operation of machinery in the building of a brewer adjoining the dwelling of the complainant, the working of the engine or pump produces strong vibratory and jarring motions which shake the complainant's house and render it unfit and unsafe for habitation, such state of things clearly amounts to a nuisance, such as will give a right of action at law, or a court of equity will restrain: *Id.*

Partnership. See *Contract.*

Change of Name—Evidence.—It is competent, in an action against a partnership, to show that notwithstanding the withdrawal of a partner and a change of the firm name the partnership has remained practically the same, and the business was conducted by the same persons both before and after the withdrawal and change: *Mellinger* v. *Parsons*, 51 Iowa.

Pleading.

Action to recover Money paid on Contract that has been rescinded.—Where money has been paid on a contract which has been subsequently rescinded, and the repayment of the money is the only thing remaining to be done, a petition for money had and received is sufficient; but while the contract is subsisting, the action can only be brought on the agreement: *Middleport Woollen Mills* v. *Titus*, 35 Ohio St.

Variance—Action ex contractu—Proof of Trover and Conversion, or Fraud and Deceit.—A party cannot sue on a contract of sale and purchase and recover for trover and conversion, or fraud and deceit: *Carson et al.* v. *Cummings*, 69 Mo.

Therefore, where plaintiff sued for the price of cattle, alleging that they were purchased by defendant C. as agent for his co-defendants M., K. & Co., and were received by M., K. & Co. and sold by them, and the proceeds appropriated to their own use: *Held*, that if it appeared that M., K. & Co. had never authorized C. to purchase for them, and that they received the cattle as the property of C., and not as their own property, they were not liable, notwithstanding it was shown that the cattle were bought by C. for their account, and at the time they were delivered to M., K. & Co., C. informed them that he had so bought them. Whether M., K. & Co. would have been liable to plaintiff in some other form of action, *quære: Id.*

Possession.

Adverse—Principal and Surety.—A. sold a tract of land to B., from whom it passed by mesne conveyances to the defendant, who took possession. The sale to B. was on credit, B. giving his bond for the purchase-money with plaintiff as surety. Plaintiff being compelled to pay the bond, took a conveyance of the land from A. and brought this suit to recover possession. Defendant relied on the Statute of Limitations: *Held*, that the possession of B., and of the defendant under him, was subordinate to the rights of A., and in the absence of evidence to show that it ever assumed a hostile character, the statute

never commenced to run. Plaintiff was, therefore, entitled to recover; but upon refunding to the plaintiff the amount of the purchase-money, defendant could retain the land: *Fulkerson* v. *Brownlee*, 69 Mo.

RAILROAD. See *Negligence.*

REAL AND PERSONAL PROPERTY.

Things Personal by Nature may become Realty by their use and position.—What is in its nature otherwise personal property, nevertheless, when physically attached to the soil, or constructively attached by its use or intended use with the soil, will pass with the title to the realty: *Jenkins* v. *McCurdy*, 48 or 49 Wis.

While slabs, sawdust, shavings and other refuse matter used to fill up low and marshy ground may be a part of the realty, slabs and pieces of lumber suitable for firewood, piled up on the premises and intended to be used and removed as such, are personal property: *Id.*

RECEIVER.

Railroad under management of—Mandamus to control his Conduct.—Where the Court of Common Pleas, having jurisdiction in an action against a railroad corporation, has appointed a receiver who is in possession of the road, its property and assets, and is proceeding in the execution of the trust under the direction and orders of the court, a mandamus will not be issued against such corporation and receiver directing their conduct in operating the road: *State ex rel. Commissioners of Washington County* v. *M. & C. Railroad Co.*, 35 Ohio St.

STATUTE. See *United States Statutes.*

Construction—Tariff Laws—Meaning of Words—Commercial Term.—The phrase "goods of similar description," when used in the tariff laws, is not a commercial term, and it is not error to instruct the jury that "these words are to be taken and understood in their popular and received import as generally understood in the community at large:" *Greenleaf* v. *Goodrich*, S. C. U. S., Oct. Term 1879.

Retroactive effect of—Repeal by Implication.—Before a statute can be allowed to have a retroactive operation, the court must see that the words are so clear, strong and imperative in their retrospective expression that no other meaning can be attached to them, or that the plain intention of the legislature could not otherwise be gratified: *Appeal Tax Court of Baltimore* v. *Western Md. Railroad Co.*, 50 Md.

Where rights are acquired under a statute in the nature of a contract, or where there is a grant of power, a repeal of the statute will not divest the right or interest acquired, nor annul acts done under it. *Id.*

The general doctrine on the subject of implied repeal is that where there are two acts on the same subject, both are to be given effect, if possible. If, however, the two acts are plainly repugnant to each other in any of their provisions, the later act, without any repealing clause, will operate to the extent of the repugnancy as a repeal of the first; and even where two acts are not, in express terms, repugnant, yet, if the later act covers the whole subject of the first act and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act: *Id.*

Where the powers or directions contained in several acts are such as may well subsist together, a repeal by implication is never declared: *Id.*

SURETY. See *Possession.*

Liability upon Bond cannot be extended by Implication.—Where there are several distinct and severable undertakings embraced in the same written agreement, and a bond is executed to secure the faithful performance of one of such undertakings, the liability of the surety upon the bond cannot be extended to embrace the other undertakings not specifically covered by the bond: *Noyes* v. *Granger et al.*, 51 Iowa.

TAXATION.

Estoppel against disputing Illegal Taxation.—Payment of town taxes for a period of five years by the owners of land not legally liable to such taxation, submission for a like period to the exercise of jurisdiction by the town authorities in other matters, and participation in an election at which a subscription to a railroad company was voted by the town, in payment of which bonds were subsequently issued, are not sufficient by themselves to estop such persons from disputing the legality of such taxation: *Town of Cameron* v. *Stephenson*, 69 Mo.

Taxation of Public Debts of other States, held by Residents of this State, and exempted from Taxation by such States—Situs of the Stock, the Domicile of its holder.—The power of taxation may be exercised by this state upon stocks, bonds or other certificates of public debt issued by other sovereign states, or by municipalities created by them, which are exempted by the states issuing them, and owned by citizens or residents of this state: *Appeal Tax Court of Baltimore* v. *Patterson*, 50 Md.

The contract of exemption is limited to the state granting it, as its authority is only co-extensive with its territory, and cannot operate on the rights and powers of other states: *Id.*

The situs of the stock being that of the domicile of its holder, his property is subject to the sovereign powers of the state wherein he resides. Whether this power should be exercised or not is a legislative, not a judicial question: *Id.*

TRESPASS.

May be maintained against former Owner to whom price is still due.—Plaintiff, being in the exclusive and peaceable possession and control of property with the acquiescence of defendant (the owner or former owner of an interest therein), will not be prevented from maintaining an action for trespass to such property against defendant, by the fact that plaintiff is liable to him for the value of such interest: *Wausau Boom Co.* v. *Plumer*, 48 or 49 Wis.

TRIAL. See *Witness.*

UNITED STATES COURTS.

Division of Opinion of Judges in Circuit Court.—When on the trial or hearing of a cause the judges of the Circuit Court are opposed in opinion on a material question of law, the opinion of the presiding

judge is to prevail and be considered the opinion of the court for the time being, but the judgment or decree rendered may be reviewed on writ of error or appeal, without regard to its amount, upon a certificate of the judges stating the question upon which they differed: *Dow* v. *Johnson*, S. C. U. S., Oct. Term 1879.

Legal and equitable Actions—Joinder in one Suit.—In the Federal courts the union of equitable and legal causes of action in one suit is not permissible under the Process Act of 1792, substantially re-enacted in the Revised Statutes, declaring that in suits in equity, in the Circuit and District Courts of the United States, the forms and modes of proceeding shall be according to the principles, rules and usages which belong to courts of equity. So held in a case transferred to the Federal court from a court of Texas, in which state the union of equitable and legal causes of action in one suit is permitted: *Hurt* v. *Hollingsworth*, S. C. U. S., Oct. Term 1879.

United States Statutes.

Effect of the Revision of 1873—*Power of Courts to look at former Acts.*—The Revised Statutes of the United States must be treated as a legislative declaration by Congress of the statute law on the subjects which they embrace on the first day of December 1873, and when the meaning is plain the courts cannot look to the statutes which have been revised to see if Congress erred in that revision: *United States* v. *Bowen*, S. C. U. S., Oct. Term 1879.

But when it becomes necessary to construe language used in the revision which leaves a substantial doubt of its meaning, the original statutes may be resorted to for ascertaining that meaning: *Id.*

Waiver. See *Insurance.*

Warehouseman. See *Bailment.*

Warranty. See *Mortgage.*

Witness.

The Maxim Falsus in uno, &c.—The uncorroborated testimony of of a witness who wilfully testifies falsely to a fact material to the issue may be taken by the jury as unworthy of credence: *Dye* v. *Scott*, 35 Ohio St.

Trial—Cross-examination.—In England, if a witness is called to prove any facts connected with the case, he becomes a witness for all purposes, and the other side may cross-examine him in regard to all matters relevant to the issues before the jury. In this country this right is limited to facts and circumstances connected with matter stated by the witness in his direct examination; and if the other side proposes to examine him respecting other matters, they must do so by making him their own witness: *Griffith* v. *Diffenderffer*, 50 Md.